IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 28.06.2006

Coram:

The Honourable Mr. Justice V. DHANAPALAN

C.M.A. No. 1200 of 2006 & C.M.P. No.4970 of 2006

1. Sporting Pastime India Limited
Registered Office No.19, Kothari Road
Nungambakkam
Chennai - 600 034

2. K.K. Shivakumar .. Appellants

Vs.

Kasthuri & Sons Limited
859 & 860 Anna Salai
Chennai - 600 002 .. Respondent

Civil Miscellaneous Appeal filed under Section 10-F of the Indian Companies Act, 1956 against the order dated 27.12.2005 in C.A. Nos.154 of 2005 in C.P. No.50 of 2005 pending on the file of the Additional Principal Bench of the Company Law Board.

For appellants Mrs. Elizabeth Seshadri
For M/s. Iyer & Thomas

For respondent Mr. Arvind P. Datar,
Senior Counsel
for Mr. Muizz Ali

JUDGMENT

Against the Company Petition filed by Kasthuri & Sons Limited ("KSL") before the Company Law Board, Southern Region Bench, Chennai, under Sections 397, 398, 402 and 403 of the Indian Companies Act, 1956 ("the Act") alleging acts of oppression and mismanagement in the affairs of Sporting Pastime (India) Limited ("SPIL"), the respondents 1,2,5,8,9 and 10 in the Company Petition have filed C.A. Nos. 154, 155 and 160 of 2005 before the Additional Principal Bench of the Company Law Board ("CLB") under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act, 1996") to direct the parties for arbitration and dismiss the Company Petition as not maintainable on the ground that the grievances of KSL form part of Clause 21 of an agreement dated 19.07.2004 which provides for resolving the disputes by arbitration and that KSL has already instituted the arbitration proceedings to resolve certain disputes, which are inter-connected with the acts complained of in the Company Petition. The CLB, upon hearing the arguments of both sides, has rejected the prayer of the

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applicants to refer the parties to arbitration in terms of Section 8 of the Act, 1996 and dismissed the C.A. Nos. 154, 155 and 160 of 2005. Aggrieved by this order of the CLB, the present appeal.

2. For the purpose of easy comprehension, the parties are referred to as per their ranking in the Company Petition.

3. According to the petitioner in the Company Petition, the facts in nutshell, which led to the petition are that the first respondent Company incorporated in May 1994 as a 100% subsidiary of the petitioner for the sole purpose of establishing, maintaining and conducting a Golf course-cum-beach resort could not achieve its main object and therefore, the petitioner entered into an agreement with the second respondent on 19.07.2004, regarding the taking over of the Company. Accordingly, the second respondent acquired 90% shareholding, controlling and management interest in the Company for a lump sum consideration of Rs.2.43 crores, besides agreeing to discharge the debts and liabilities due by the Company to the petitioner and several others and relieve the petitioner of its guarantee obligations in respect of the Company within the stipulated time. Further, the liabilities taken over by the second respondent remain undischarged. However, pursuant to acquisition of the shares by the second respondent, the petitioner's nominees resigned from the office of Director and the respondents 3 and 4, being nominees of the second respondent were inducted on the Board of Directors of the Company. It is the grievance of the petitioner in Company Petition that ever since taking over the control and management of the Company in August 2004 by virtue of the agreement dated 19.07.2004, the respondents 2 to 6 have been reportedly indulging in acts of oppression and mismanagement in the affairs of the Company and therefore, the petitioner invoked the jurisdiction of Sections 397 and 398 of the Act and prayed the CLB to allow the Company Petition as prayed for.

4. The prayer sought for in the Company Petition are:

a. to supersede the present Board of Directors and consequently appoint an independent Chairman and such other Directors,

b. to declare the increase in share capital from Rs.27 crores to Rs.53 crores made on 28.10.2004 as illegal and void ab initio.

c. to cancel the allotment of shares of Rs.25 crores made on 28.10.2004 and direct the consequent reduction of share capital under Section 100 of the Companies Act, 1956,

d. to declare all proceedings and resolutions passed at the meeting held on 28.10.2004 as void and inoperative and also declare any further resolutions that may be passed either at Board Meeting or General Meeting as void and inoperative,

e. to rectify the Register of Members suitably consequent to the cancellation of the allotment of shares of Rs.25 crores on 28.10.2004,

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f. to further direct rectification of Register to include Mr. S. Kuppuswamy and Mr. T.B. Narayanaswamy as members as the first respondent Company holding one share each and by reducing the two shares from the total share holding of the petitioner and

g. to further rectify the Register of Members as an interim measure so that the petitioner is fully protected from the effect of Section 45 and

h. to appoint a Commissioner to visit the Registered Office of the Company and such other offices to inspect the records and books of the Company, to authenticate the Minutes Book of the Board of Directors, the Minutes Book of the General Meetings, Share Register and other statutory records situated or which ought to be situated at the Registered Office of the Company.

5. The appellants who were the applicants in C.A. Nos. 154, 155 and 160 of 2005 contended before the CLB and according to them, the Company Petition is not maintainable and it has to be dismissed in limine and in view of the acts complained of in the Company Petition are covered by the agreement, which contains arbitration clause, the parties must be referred to arbitration, without adjudicating the disputes by the CLB. It is their case that the petitioner in the Company Petition, pursuant to the agreement, transferred 90% of its shares in the Company on receipt of Rs.2.43 crores in favour of the second respondent (KCP) and the petitioner has to sell the remaining 10% of its holding in the Company to the second respondent or his nominees and it cannot have any grievance in the affairs of the Company. The underlying object of the agreement is that the petitioner would cease to hold any shares in the Company and is not concerned with the Company. The terms of the agreement dated 19.07.2004 have not been incorporated in the Articles of Association of the Company. It has been incorporated as early as in the year 1994 and the petitioner could not carry on the business in terms of its main object all these eleven years. The Company could not achieve its main object, even after entering into the agreement with the petitioner. It is not fair on the part of the petitioner to expect any positive achievement immediately on entering into the agreement. If, in any proceedings, the maintainability itself is being seriously questioned, it is appropriate that the Court should first consider and decide the question of maintainability, especially when it would go to the root of the matter.

6. The common prayer of the appellants herein in the three Company Applications is to admit those applications and direct the parties to settle their disputes through the arbitration forum chosen by them and dismiss the Company Petition as not maintainable both on law as well as on facts.

7. On analysing the statements in the Company Petition and the applications made and the pleadings therein and upon perusing the material evidence and the submission made before it, the CLB held that the prayer

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of the applicants to refer the parties before the CLB to arbitration in terms of Section 8 of the Act, 1996 does not merit any consideration and accordingly, rejected the applications directing the respondents to file their counter statement by 20.01.2006 and rejoinder by 07.02.2006 and posted the Company Petition for further hearing on 15.02.2006 at 2:30 p.m.

8. Heard Mrs. Elizabeth Seshadri for M/s. Iyer and Thomas, learned counsel for the appellants and Mr. Arvind P. Datar, learned Senior Counsel for Mr. Muizz Ali, learned counsel for the respondent.

9. Mrs. Elizabeth Seshadri, learned counsel for the appellants has contended that:

a. the order of CLB is contrary to Law and has been passed without due consideration of all relevant facts presented before the Bench, without application of mind to the legal provisions applicable to the facts of the case and by not applying the applicable law so as to meet the legislative intendment,

b. the CLB ought to have seen that the Company Petition that has been filed by the respondent is a vexatious petition which is not maintainable in law and the respondent herein is guilty of forum shopping and hence, the CLB ought to have rejected the Company Petition in limine,

c. the petition has been filed on the basis of an agreement dated 19.07.2004 which contains an arbitration clause whereby parties had agreed to refer all and any disputes arising out of the agreement to arbitration,

d. the relief sought for in the Company Petition in the case of oppression and mismanagement without any substantial issue involved in the petition is contrary to the provision contemplated under Section 8 of the Act, 1996 as the issues involved are disputes which have to be referred to arbitration,

e. the CLB has failed to appreciate the fact that by virtue of the said Arbitration Agreement between the parties, the matters complained of ought to have been referred to the Arbitration Tribunal which had been constituted and it was a fact that the CLB was duly informed about the stage of the arbitration proceedings. Section 8 of the Act, 1996 requires any judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement to refer the parties to arbitration and the only requirement in this regard relates to the application to be made by a party in the proceedings before the judicial authority praying before the judicial authority to refer the matter complained of in that proceedings to arbitration,

f. the CLB, being a judicial authority, is bound to act according to the mandatory direction contained in Section 8 of the Act,

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1996 by admitting the application, taking note of the substance of the matter complained of and directing the parties to refer the dispute to the arbitrators,

g. Clause 23 of the agreement dated 19.07.2004 which deals with the arbitration matter provides that KSL and SPIL shall not effect any change to the equity structure of SPIL except strictly as provided in the said agreement and the CLB has not taken note of that clause which squarely covers the impugned allotment of shares covered by the petition before the CLB. There is no doubt that the Arbitration Agreement, by virtue of the above clause, deals with any matter due to which any change has occurred to the equity structure of SPIL,

h. the ratio of the Supreme Court decision in Sukanya Holdings Private Limited Vs. Jayesh H. Pandey reported in (2003) 5 SCC 531, has been mechanically followed by the CLB,

i. as part of the obligation of the agreement only Mr. K.C. Palaniswamy, the applicant in C.A. NO.155 of 2005, had organized receipt of funds to the tune of Rs.25 crores into SPIL and in pursuance of the agreement only and to further covenants of the agreement only, the money was brought against which the impugned issue of shares was made by SPIL and therefore, to state that the subject matter is not covered by the agreement would be patently wrong,

j. if KCP had organised the inflow of funds in the form of secured or other loan into SPIL, such party would have been a creditor of SPIL and he would be having better enforceable rights and would be in a better position than KSL.

k. the Arbitration Tribunal constituted under the Act, 1996, has all the powers including to test the validity or otherwise of an agreement and in effect, is a substitute for a Civil Court though it functions and the arbitrator could go the validity of the agreement and declare in a given case that the agreement is null and void merely because the aggrieved shareholders could move the CLB under Sections 397 and 398 of the Act,

l. the CLB was bound to take note of the fact and apply the principles laid down in the case of R. Balakrishnan Vs. Vijay Dairy & Farm Products Private Limited reported in (2005) 59 SCL 667,

m. the CLB has committed a manifest error in judgment by stating that where allegations of oppression and mismanagement set out in the Company Petition can be adjudicated without reference to the terms of the agreement, the question of referring the parties to arbitration does not arise even if the agreement covers the same issue before the CLB,

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n. the CLB has stated that the claims made by the Arbitration Tribunal are not urged before it and therefore, the Arbitration Tribunal will adjudicate only those issues on which reference has been made by the petitioner. Assuming that the issues before the CLB are not canvassed before the Arbitration Tribunal, the Tribunal will take up only those matters which have been specifically referred to it and it must be remembered that under Section 8 of the Act, 1996, what the judicial authority is supposed to do is to refer the parties to arbitration, even if at a time when arbitration has not been commenced by the parties,

o. if the parties were allowed to go on agitating matters arising out of one single agreement before multiple forum, the same would be opposed to public policy and would lead to disastrous consequences and

therefore, prayed that the appeal has to be allowed on the above grounds.

10. In support of her contentions, the learned counsel for the appellants has relied on:

a. the decision of the Supreme Court reported in AIR 2003 SC 2881 in the case of Pinkcity Midway Petroleums in which paragraph 14 reads as under:

> "This Court in the case of P.A. Gajapathy Raju and others Vs. P.V.G. Raju (dead) & others) has held that the language of Section 8 is peremptory in nature. Therefore in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in their original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that, if as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case, the existence of an arbitral clause in the agreement is accepted by both the parties as also by the Courts below. The applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration."

b. The decision of the Supreme Court in the case of Konkan Railway Corporation Ltd. Vs. Rani Construction Pvt. Ltd. (AIR 2002 SC 778) in which it was held that Section 16 of the Act, 1996 empowers the Arbitration Tribunal to rule on its own

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jurisdiction including to rule on any objection with respect to the existence or the very validity of the arbitration agreement and therefore, it is not for the Courts to decide on the applicability of the arbitration clause to the facts of the case. The Courts are obligated to leave it to the Arbitration Tribunal to determine the issue of applicability of the arbitration clause.

c. The decision of the Supreme Court in the case of P. Anand Gajapathi Raju & Others Vs. P.V.G. Raju (dead) & others (2000 (4) SCC 539) in which it was held that the language of the Section 8 of the Act, 1996 is quite unambiguous and peremptory in nature. In case where there is an arbitration clause in the agreement between the parties, it is obligatory on the part of the Court to refer the parties to arbitration.

11. The learned counsel for the appellants has placed further reliance on:

a. The decision of the Company Law Board in the case of Pinaki Das Gupta Vs. Maadhyam Advertising Pvt. Limited & Others (2003 114 CC 346) wherein it was held that the matters covered in a proceeding under Sections 397 and 398 are not outside the purview of the provisions of Section 8 of the Act, 1996, if the requirements of the Section are satisfied.

b. the decision of the Company Law Board in the case of Air Touch International (Mauritius) Limited Vs. RPG Cellular Investments and Holdings Pvt. Ltd. (CLB) 2004 121 CC 647 wherein it was held that when a party is able to establish that there does exist a bona fide dispute that has arisen from an existing arbitration agreement and that the Arbitration Tribunal can settle it by appropriate reliefs, the Company Law Board and any other judicial authority will have to refer the parties to arbitration.

12. Per contra, Mr. Arvind P. Datar, learned Senior Counsel representing Mr. Muizz Ali, learned counsel for the respondent who was the petitioner in the Company Petition has contended that:

a. the alleged acts of oppression and mismanagement in the affairs of the Company and the essential terms and conditions of the agreement dated 19.07.2004 governing the rights and obligations of the parties thereto must be examined and the sole object of acquiring the Company by the second respondent is to use it as a medium for parking illegal funds, to exploit its real estate by pledging the title deeds for his personal benefit and to divert illegal funds received from abroad for personal gains. The directors, being trustees as regards the assets of the Company, have completely breached their fiduciary obligations by not utilizing them for the Company's benefit,

b. the second respondent pledged all the share certificates accounting for 90% of the shares and original title deeds of the

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Company with a foreign company in violation of the provisions of the Act and Foreign Exchange and Management Act,

c. pursuant to transfer of shares in favour of the second respondent and his nominees in terms of the agreement, there are only a total number of six members in the Company including the petitioner. The second respondent has not chosen to ensure the minimum number of seven members which is violative of Section 45 of the Act, compelling the petitioner to transfer, out of its holding, one share each to S. Kuppuswamy and T.B. Narayanaswamy to maintain the minimum statutory number of seven members,

d. the respondents 2 to 4, along with one Gopinath Athappan, son of the third respondent were involved in the promotion of a group of Companies with cross-holdings incorporated or acquired for siphoning of the Company's funds and assets and diverting Rs.25 crores out of the huge amounts received from a Canadian Company to the first respondent by way of parking measure and not towards investment or advance share capital. The conversion of Rs.25 crores into share capital of first respondent company was a deliberate manipulation, which resulted in attachment of the said sum by the Income Tax Department for the dues and penalties of the Company. Thus, the Company lost its substratum and the main business of the Company has become incapable of being performed due to the huge liabilities incurred and illegalities committed by the Company,

e. the authorised share capital of the Company has been increased from Rs.27 crores to Rs.53 crores and the allotment of shares of Rs.25 crores has been made in October 2004, without meeting the requirements of the Act and notice to the petitioner,

f. the second respondent and his nominees failed to discharge the liabilities, forming part of the consideration for the transfer of shares, in terms of the agreement dated 19.07.2004 and the petitioner was constrained to make various payments as on 31.07.2005 on behalf of the Company, an aggregate sum of Rs.2.96 crores,

g. the Directors have disregarded several statutory provisions of the Act regarding convening of meetings, maintenance of books of account, allotment of shares and appointment of directors and the statutory records of the Company are not available at the Registered Office of the Company, as confirmed by the Commissioner appointed by the Bench and

h. the affairs of the Company are being conducted with an intention to defraud its creditors, members or any other persons.

13. In respect of his contention, the learned Senior Counsel for the respondent has relied on the decisions of the Supreme Court reported in

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(2003) 5 SCC 531 (Sukanya Holdings (P) Limited Vs. Jayesh H. Pandya) and (1999) 5 SCC 688 (Haryana Telecom Limited Vs. Sterlite Industries (India) Limited).

14. I have carefully considered the rival submissions made by the learned counsel on either side and the issue which is for consideration before me is whether the decision of the CLB in rejecting the Company Applications in the Company Petition for referring the matter to arbitration under Section 8 of Act, 1996 in the light of the subject matter of agreement dated 19.07.2004 is correct or not.

15. Before considering the above issue, it would be useful and appropriate to analyse the provisions contemplated under Section 8 of the Act, 1996 which are having utmost relevance and importance to be borne in view to decide the issue.

Section 8 of the Act, 1996 reads as under:

> "A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

16. By virtue of Section 8 of the Act, 1996, it is mandatory for the judicial authority, before which an action has been brought in a matter, being the subject matter of an arbitration agreement, to refer the parties for arbitration provided, (a) the application under this Section is made any time before submitting the "first statement on the substance of the dispute" and (b) the judicial authority is satisfied that there is a valid arbitration agreement. Sub-section (3) provides that an arbitration may be commenced or continued and an arbitral award be made in spite of (a) application made under Sub-section (1) and (b) pendency of the issue before the judicial authority.

17. It is seen that the CLB, before rejecting the Company Applications, has given due consideration to the facts and circumstances pleaded before it and the following decisions of the Supreme Court:

a. Airtouch International (Mauritius) Limited Vs. RPG Cellular Investments & Holdings Private Limited (2004) (Volume 121) CC 647

b. Canara Bank Vs. Scanomax India Limited (2000 99 CC 285

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c. Pinaki Das Gupta Vs. Maadhyam Advertising Private Limited (2003) Vol. 114 CC 346

d. R. Balakrishnan Vs. Vijay Dairy Farm Products (P) Limited (2005) 59 SCL 667

18. Further, the CLB has gone through the relevant terms of the agreement dated 19.07.2004 containing arbitration clause as under:

a. The issued, subscribed and paid-up capital of the Company of Rs.3 crores as at 19.07.2004 consisting of 30,00,000 equity shares of Rs.10/- each shall be increased to Rs.27 crores consisting of Rs.2,70,00,000 equity shares of Rs.10/- each. Accordingly, the authorised capital of the Company shall be increased, on receipt of the requisite fee from the second respondent payable to the Registrar of Companies for the increase of such authorized capital (Clause 1)

b. The Company shall allot 2,40,00,000 equity shares of Rs.10/- each fully paid at par to the petitioner against book debts due by the Company to the petitioner (Clause 2)

c. The petitioner shall sell in favour of the second respondent and or his nominees 90% of the total paid-up share capital of the Company, viz., 2,43,00,000 of Rs.10/- each for a total consideration of Rs.2,31,50,000/- within 30 days of the date of execution of the agreement (Clause 3)

d. The Company shall hold a meeting of its Board of Directors immediately after registering the transfer of shares in terms of Clause 3 hereabove so as to reconstitute the Board in accordance with the second respondent's intent (Clause 4)

e. The second respondent shall be responsible, after takeover of 90% ownership, control and management of the Company, for the finance, operations and management of the Company (Clause 5)

f. The second respondent shall take over the business, assets and liabilities of the Company more fully set out in the schedules forming part of the agreement. The second respondent shall discharge all liabilities, which are outstanding as on the date of the agreement. The petitioner must be relieved of all its guarantee obligations in respect of the Company within 180 days from the date of the second respondent taking over the management of the Company (Clauses 6,7 & 8).

g. the petitioner and or the second respondent shall communicate to the Company's bankers about the proposed change in ownership and management of the Company on execution of the agreement and about the arrangements made to discharge the Company's dues to them (Clause 9)

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h. the second respondent's total cost of take over of the Company shall not exceed Rs.36,00,00,000/-, subject to the additional sum as agreed between the parties (Clause 12)

i. the petitioner is at liberty to sell its remaining 10% shareholding in the Company to the second respondent and or his nominees for a consideration mutually agreeable between them. The second respondent is agreeable in principle of the petitioner's desire (Clause 15).

j. In the event of any dispute arising out of the agreement relating to claims and counter-claims, they shall be referred to arbitration under the Indian Arbitration Law in the prescribed manner (Clause 21)

k. The Company shall not open any new bank account, until the acquisition of controlling interest by the second respondent in the Company is completed and notified to the concerned banks (Clause 23)

l. the second respondent shall indemnify the petitioner against all losses, damages, claims or demands that the petitioner may suffer on account of failure by the second respondent to discharge his obligations under the agreement (Clause 23A).

19. The CLB has further gone through the agreement dated 19.07.2004 and has given due consideration to the terms and conditions for disposing of the petitioner's shareholding, controlling and management interest in the Company in favour of the second respondent. The CLB has also observed that the agreement envisages the rights and obligations of the parties in relation to the taking over of the business, assets and liabilities of the Company. It is found by the CLB that the grievances complained of in the Company Petition in relation to (a) failure of the second respondent to maintain the minimum statutory number of seven members in the Company (b) pledge of the properties and assets of the Company in violation of the Foreign Exchange and Management Act, (c) promotion of a group of Companies for siphoning of the Company's funds, (d) increase of authorised share capital from Rs.27 crores to Rs.53 crores, (e) further allotment of shares of Rs.25 crores without meeting the requirements of the Act, (f) loss of substratum of the Company on account of the attachment by the Income Tax Department, of the bank accounts/deposits amounting to Rs.25 crores parked illegally by the second respondent and (g) several statutory violations committed by the respondent group are neither directly covered by nor emanated from the agreement dated 19.07.2004.

20. The order of the CLB further shows that the purported charges did arise independent of the agreement and after taking control and management of the Company by the second respondent, of course, in terms of the agreement in which case, the decision in R. Balakrishnan Vs. Vijay Dairy & Farm Products (P) Ltd. where the grievances were found flowing from an agreement will be of little assistance to the respondents. Similarly, the

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case laws in Airtouch International (Mauritius) Limited Vs. RPG Cellular Investments and Holdings Private Limited and Pinaki Das Gupta Vs. Maadhyam Advertising Private Limited wherein all the issues raised in the petition having directly arisen out of the agreement, did not have application to the facts of the case before the CLB. Further, the CLB has observed that the facts and circumstances in the matter of Premier Automobiles Ltd. Vs. Fiat India Private Limited do not exist in the present case and accordingly dismissed the Applications under Section 8 of the Act, 1996 and this observation of the CLB is to be taken note of.

21. The Supreme Court, in the case of Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandey, while interpreting Section 8 of the Act, 1996, enunciated the following among other principles:

a. The suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, the subject matter of the suit lies outside the arbitration agreement and also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The entire subject of the suit should be subject to the arbitration agreement.

b. There is no provision in the Act, 1996 suggesting that when the subject matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitration.

c. There is no provision dealing with the situation where some parties to the suit are not parties to the arbitration agreement.

22. Further, the Supreme Court in its decision reported in (1995) 5 SCC 688 (Haryana Telecom Limited Vs. Sterlite Industries [India] Limited) has held in paragraphs 4 and 5 as under:

> "4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.
>
> 5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the Company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a Company is contained under the Companies Act and is conferred on the Court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order

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winding up of a Company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the Company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion, was right in rejecting the application."

23. In the case on hand, the petitioner complained of the breach committed by the second respondent in discharging the liabilities of the Company taken over by him in terms of the agreement and in incurring an aggregate amount of Rs.2.95 crores by it as on 31.07.2005 for and on behalf of the Company, but no relief has been claimed before the CLB in this behalf. The petitioner, in the Company Petition, on the other hand, made a claim of Rs.31.74 crores against the second respondent spent by it in relation to operations and management of the Company and damages of Rs.5 crores for breach of the contract which are covered under clauses 5 and 23A respectively of the agreement. These claims made by the petitioner before the Arbitral Tribunal are not urged before the CLB, in which case, the Arbitral Tribunal will adjudicate only these specific issues on which reference has been made by the petitioner. It is further seen that if the allegations of oppression and mismanagement set out in the Company Petition can be adjudicated without reference to the terms of the agreement, then the question of referring the parties to arbitration does not arise even if the agreement covers the same issue before the CLB. Further, the reliefs claimed in the Company Petition cannot be granted by an arbitrator, which are available under the provisions of Sections 397 and 398 read with Sections 402 and 403 of the Act from the CLB alone and the statutory jurisdiction of the CLB can neither be ousted even by the consent of the parties. The Arbitral Tribunal would deal with reference to the specific terms of the agreement, especially when the jurisdiction and scope of powers of the CLB and those of the Arbitral Tribunal are quite different. When there is an allegation of acts of oppression and mismanagement, the CLB is empowered to deal with it independently. It is also seen that the statement of claims filed by the petitioner before the Arbitral Tribunal deals rights and obligations of the parties to the agreement dated 19.07.2004 in relation to disposal of the petitioner's (C.P. No.50 of 2005) shareholding, controlling and management interest in the Company in favour of the second respondent. The non-performance of the obligations under the agreement in discharging the Company's liabilities as per the schedules to the agreement on the respective due dates and the various acts done as well as undone pursuant to the agreement, are elaborately dealt in the statement of claims.

24. In the light of the above discussion, it is seen that the statement of claims filed by the petitioner before the Arbitration Tribunal deals with its grievances on account of non-fulfilment of the terms and conditions of the agreement by the second respondent, but the petitioner confines its reliefs only for recovery of the amounts spent for and on behalf of the Company and not for damages. In this context, the relevant recitals contained both in the statement of claims and the counter filed before the Arbitration Tribunal have to be borne in mind.

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In this connection, it is worth mentioning the allegations forming part of paragraph 5.2 of the statement of claims that the first claimant had preferred C.P. No.50 of 2005 before the Company Law Board, Chennai for certain statutory reliefs different from those prayed for in the above claim. The respondents further reported in response to the allegations made in the statement of claims about the appointment of Commissioner by the CLB in the Company Petition for authentication of the Company's statutory records that "the proceedings before the Company Law Board are not relevant to these proceedings (arbitration)". It is absolutely relevant to point out that the respondents, apart from seeking dismissal of the claims of the petitioner before the Arbitral Tribunal, claim from the petitioner, an amount of Rs.8.83 crores together with future interest at the rate of 18%. It can be seen that the statement of claims before the Arbitration Tribunal as well as the claimant's relief in C.P. No.50 of 2005 are different and distinct and in for the former case, it is a dispute arising in terms of the agreement and the statutory obligations and in the latter case, it is the relief sought for in the breach of statutory obligations and other various acts pursuant to the agreement.

25. Therefore, the CLB has observed that there is no material to show that that respondents are taking the stand before the Arbitral Tribunal that the acts complained of before the CLB are bona fide disputes directly arising out of or in connection with the agreement dated 19.07.2004, attracting the provisions of Section 8 of the Act, 1996. Further, it is also worthwhile to refer to Clause 21 of the agreement which provides as under:

> "21. In the unlikely case of disputes arising out of this agreement relating to claims and counter claims, the parties hereto agree that the same shall be referred to Arbitration under the Indian Arbitration Law. The arbitration shall be by three arbitrators. KCP shall be entitled to appoint one arbitrator. KSL shall be entitled to appoint one arbitrator. The two arbitrators so appointed shall elect the third arbitrator."

26. A reading of the above clause makes it very clear that in case of disputes arising out of agreement relating to claims and counter claims, the parties shall be referred to arbitration under the Indian Arbitration Law. In the instant case, the relief sought for in the Company Petition under the provisions of Section 397 and 398 read with Sections 402 and 403 of the Act for the various acts which are statutorily not performed like failure of the second respondent to maintain the minimum statutory number of seven members in the Company, pledge of the properties and assets of the Company in violation of the Foreign Exchange and Management Act, siphoning of the Company's funds, increase of authorised Share Capital from Rs.27 crores to Rs.53 crores, further allotment of shares of Rs.25 crores without meeting the requirements of the Act, loss of substratum of the Company on account of the attachment, by the Income Tax Department of the bank accounts/deposits amounting to Rs.25 crores parked illegally by the second respondent and several statutory violations committed by the

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respondent group, are neither directly covered by nor emanated from the agreement dated 19.07.2004.

27. Therefore, in the light of the statutory obligations, it cannot be said that the issues involved in the Arbitration Tribunal as well as the issues coming under Sections 397 and 398 of the Act are two different issues and therefore, in view of the difference in nature of powers and the authority under Section 8(3) of the Act, 1996, empowering the arbitrator to make an award even during the pendency of an application under Section 8, there is no scope for any conflict in the decisions of the Arbitral Tribunal in respect of the proceedings referred to it. Whereas the scope of Sections 397 and 398 of the Act in dealing with the above statutory obligations is distinct and the CLB has every jurisdiction to deal with it which is not coming under the purview of Clause 21 of the agreement which only indicates the dispute arising out of the agreement and relating to claims and counter claims. Therefore, in my considered view, the decision of the CLB holding that the power vested under the Act to deal with the Company Petition preferred under Sections 397 and 398 read with 402 and 403 of the Act is available to the CLB to deal with the Company Petition pending before it. Thus, in the light of the above legal position, it would not be improper to say that the CLB has rightly rejected the Company Applications to refer the matter to the Arbitration Tribunal and accordingly, the decisions referred by the CLB in rejecting the applications are in conformity with the above legal position. In such a view of the matter, I am of the view that there is no point for this Court to interfere with the findings of the CLB and accordingly, the conclusion arrived at by the CLB in rejecting the applications in C.A. Nos.154, 155 and 160 of 2005 is in conformity with the provisions of law and I have no hesitation in holding that the decision of the CLB is perfectly correct. and accordingly, I dismiss the appeal filed by the appellants herein.

28. However, the Company Petition filed by the respondent herein is pending before the CLB and this Court has only passed an interim order, directing the CLB to proceed with the hearing of the Company Petition, while staying the passing of final orders. In view of the above conclusion arrived at by this Court, it would only be proper to direct the CLB to dispose of and pass orders in the Company Petition as expeditiously as possible in accordance with law.

In the result, the Civil Miscellaneous Appeal is dismissed without any order as to costs and the connected C.M.P. is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

cad

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To

The Additional Principal Bench
The Company Law Board
Chennai

+ 1 CC To Mr.H.Karthik Seshadri, Advocate SR NO.27384

+ 2 CCs To Mr.Feroz Ali, Advocate SR NO. 27370

C.M.A. No.1200 of 2006
28.06.2006

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